IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-4551

PHILIP A. GILLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Philip A. Gillis prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 8, 1976.

OPINIONS BELOW

The opinion of the District Judge denying a Motion for New Trial dated November 4, 1975, is printed as Appendix "A", infra. The Court of Appeals affirmed without opinion. The Order of Affirmance dated July 8, 1976, is printed as Appendix "B", infra.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1976, Appendix "B", infra. A timely petition for rehearing was filed accompanied with a suggestion of rehearing en banc. A divided Court denied the petition for rehearing en banc and the panel which originally heard the appeal denied the petition unanimously by order dated August 17, 1976, appendix "C", infra. Mr. Justice Stewart has ordered that the time for filing this petition be extended to September 30, 1976. Appendix "D", infra. Jurisdiction is conferred upon this Court by 28 USC 1254.

QUESTIONS PRESENTED FOR REVIEW

I.

When a defendant offers evidence that he suffers from a mental disease or defect which deprives him of substantial capacity to conform his conduct to the requirements of the law, but denies that he is insane, is he entitled to an instruction on mental disease or defect as excluding criminal responsibility?

II.

Does an appellate court deny a criminal litigant due process of law by affirming his conviction without giving a statement of reasons or a rationale for its decision? If not, is it the accepted and usual course of judicial proceedings for an intermediate appellate court to affirm without opinion in a criminal appeal presenting nonfrivolous questions for decision?

III.

Where the only contested issue in a criminal trial is whether the defendant acted wilfully and the jury requests additional instructions on this issue, is it error for the trial judge to refuse supplemental instructions, but instead to send the bailiff into the jury room during the jury's deliberation in order to replay portions of the original instructions which had been recorded.

In addition to the foregoing questions which are argued hereafter in the reasons for granting the Writ, petitioner prays that in the event that this petition is granted without limitation, he be allowed to argue the following additional questions:

IV.

In a failure to file prosecution, is defendant entitled to have the jury consider, on the issue of wilfulness, that defendant filed his returns and paid his taxes before he was contacted by the Intelligence agents, that he was truthful to the agents and was aware his delinquency would cost him substantially in interest and penalties?

V.

Where a defendant has made a substantial claim of discriminatory prosecution, is he entitled to an opportunity to prove his claim?

CONSTITUTIONAL ISSUES INVOLVED

United States Constitution, Amendment V, provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner was charged in a three-count information with having wilfully failed to file at the time required by law his personal income tax returns for the years 1968, 1969, and 1970. At trial, the basic facts of the prosecution were stipulated. The sole issue was petitioner's wilfullness.

Petitioner testified in his own behalf and acknowledged his filing delinquency. He testified to having been treated by several psychiatrists for a personality disorder over a period of ten to twelve years. From about September, 1970 through September or October of 1971, he treated once or twice a week with a psychiatrist, Dr. Kenneth Israel. Petitioner expressly disclaimed that he was insane.

Dr. Israel testified for the defense. In the course of his treatment with Dr. Israel, petitioner discussed his failure to file his tax returns. Dr. Israel diagnosed the petitioner as suffering from a mental disorder called a passive-agressive personality. Dr. Israel gave his opinion that he did not believe that petitioner's failure to file his tax returns was wilful, as he understood that term.

Prior to trial, petitioner had been examined by a government psychiatrist, Dr. Robert Behan, who testified in rebuttal. Dr. Behan diagnosed petitioner as suffering

from a "personality trait disturbance, passive-aggressive personality, manifested by serious procrastination." It was his opinion, however, that petitioner was capable of wilfully failing to file his income tax returns.

Petitioner submitted the following instruction on mental capacity::

> There has been tesimony offered on the question of the defendant's capacity to commit the offense charged. The rule which you should apply in assessing this evidence is as follows: a person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity to conform his conduct to the requirements of the law.

The trial judge rejected this request to which the petitioner properly objected. The sole instruction on mental capacity was the following (edited to omit a corrected slip of the tongue):

> Now, there has been evidence by the defendant during this trial to show his mental condition. It has not been claimed by the defense that he was insane at the time that the alleged crimes here were committed. The evidence offered concerning his mental and emotional problems was admitted into evidence solely for the purpose of helping you to decide whether his mental or emotional state of mind contributed to his failure to wilfully file the returns, the failure of which he is charged in this information.

> Now, an expert testifying in reference thereto may base his opinion on facts which he has observed or on facts which he has heard others relate or on hypothetical facts based on the evidence. Expert testimony on the issue of the defendant's mental condition is not binding on the jury and you may reach a contrary conclusion on the basis of other evidence in the case. You should, however, consider it together with all of the other evidence in the case in determining the defendant's mental condition at the time of the alleged crimes charged in the indictment [information?].

The jury commenced its deliberations on a Thursday afternoon, recessed for the evening, and on Friday shortly before noon, sent a note requesting a dictionary and a definition of wilful and wilfullness. During an in-chambers conference, the judge decided not to give further instructions. Petitioner then requested the judge to at least instruct the jury that the definition of wilfullness with which they were concerned was a legal one rather than a layman's definition. The trial judge declined to give such an instruction. In open Court, he told the jury:

> I have your note, and I have called the note to the attention of counsel and the parties. I must respectfully decline your question. The definition of wilfullness is contained in my instructions, and I refer you to the instructions.
>
> You have the cassette, and you can play the cassette over as far as the instruction on wilfullness is concerned, or any other part of my

> instruction. If you have any difficulty in finding the place on the tape as to where the definition of wilfullness is made, Mr. Paul, the bailiff, will gladly assist you.

At approximately five o'clock Friday afternoon, the jury reached a verdict on the first two counts, but had not yet agreed on the third count. Defendant was acquitted on the first two counts. The jury returned for further deliberations on Monday morning and at about eleven o'clock returned a verdict of guilty on count three, concerning the 1970 return.

Defendant was sentenced to imprisonment for three months and ordered to pay a fine of $5,000.00. He took a timely appeal to the Court of Appeals which affirmed without opinion.

In a motion for rehearing, petitioner alleged that the failure of the Court of Appeals to give the reasons for its decision denied him due process of law. The motion for rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

I

PETITIONER WAS ENTITLED TO THE REQUESTED INSTRUCTION RECOMMENDED BY THE AMERICAN LAW INSTITUTE IN THE MODEL PENAL CODE §4.01.

a. *Guidelines should be provided by this court as to how the question of whether mental disease or defect excludes criminal responsibility should be presented to a jury.*

The last time that this Court wrote on the question of insanity was nearly 80 years ago, *Davis* v. *United States*, 160 US 469 (1895), and *Davis* v. *United States*, 165 US 373 (1897). There have been such great strides in the field of psychiatry since then that *Davis* can hardly be considered authoratative any more. The Sixth Circuit expressly noted this in *United States* v. *Smith*, 404 F 2d 720, at 723-724 (1968):

> A Supreme Court holding directly in point on the issue of criminal responsibility would, of course, foreclose our consideration of any alternative [to the classic M'Naghten right-wrong test] but three factors weigh strongly against the *Davis* cases being regarded as such specific authority. First, the advance of scientific knowledge in the field of psychiatry since 1897 is itself sufficient to render inapplicable any case decided without benefit of modern knowledge [citations]. Second, the *Davis* cases were primarily concerned with burden of proof and laid down no rule of law as to a single insanity test . . . and third, many courts prior to now have formulated tests in modern psychiatric terms with at least the tacit sanction of the United States Supreme Court. [Citations] All of these Courts have rejected the M'Naghten test.

Indeed, this Court, some 30 years ago in *Fisher* v. *United States*, 328 US 463, recognized that the advances in psychiatry might require new tests for the determination of criminal responsibility. At 476 the Court said:

> It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact a rule of responsibility for crime for which petitioner contends.

The Court then declined to interfere with the District of Columbia rule because it did not exceed any constitutional limitations.

The precise issue tendered here — whether a claim of insanity is a prerequisite to an instruction on mental disease or defect — has divided the lower courts. This is pointed out in the notes of the Advisory Committee on the Rules, as published in the Federal Rules of Criminal Procedure, Rule 12.2, 18 U.S.C.A., p. 245:

> There is some disagreement as to whether it is proper to introduce evidence of mental disease or defect bearing not upon the defense of insanity, but rather upon the existence of the mental state required by the offense charged. The American Law Institute's Model Penal Code takes the position that such evidence is admissable. [Citations] The federal cases reach conflicting conclusions.

The American Law Institute Model Penal Code §4.01 was adopted in 1961. Since that time, a large number of state and federal appellate courts have considered it in thoughtful opinions and adopted it in varying degrees. Many of these cases are cited in *Smith, supra*, 404 F 2d at 724. Thus, in writing on this subject, this Court would have the benefit of the experience and wisdom of these courts in fashioning a uniform and cohesive rule for all federal prosecutions.

b. *Petitioner was entitled to the instruction recommended by the Model Penal Code §4.01 (1):*

Petitioner requested an instruction taken verbatim from the Model Penal Code §4.01(1):

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to conform his conduct to the requirements of law.[1]

The trial judge rejected this instruction without any stated reason, despite the fact that the Sixth Circuit had specifically approved the substance of this section of the Model Penal Code in *United States* v. *Smith*, 404 F 2d 720 (1968), and *United States* v. *Cartwright*, 429 F 2d 1298 (CA 6, 1970). See also *United States* v. *Gay*, 522 F 2d 429 (CA 6, 1975), decided after petitioner's trial.

Even though the Sixth Circuit affirmed without opinion, three factors indicate with certainty that the reason was that petitioner denied that he was insane.

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[1]We omitted "either to appreciate the criminality [wrongfulness] of his conduct or" as having no application to the evidence presented.

First, in its brief in the Court of Appeals, the government argued (quoting from its Summary of Agument at page 10):

> Application of the test for criminal responsibility which has been approved by this Court is limited to cases where an insanity defense is reaised. Here, no insanity defense was pleaded or raised by the evidence, and defendant was not entitled to such an instruction.

Second, as the government pointed out is its brief, the three applicable Sixth Circuit cases, *Smith*, *Cartwright* and *Gay*, *supra*, although adopting the substance of the Model Penal Code, all described the defense as one of insanity. Thirdly, the questions which the panel directed to petitioner's counsel, on oral argument, indicated that the Court considered this as a defense of insanity.[2]

Finally, and perhaps conclusively, there is no rational way to distinguish this case from the three Sixth Circuit cases except on the basis that the defense of insanity must be raised before the rule of the Model Penal Code becomes applicable.

If this be the rule of the Sixth Circuit, then it should be rejected. In *Fisher* v. *United States*, 328 US 463, at 475, this court said (in dictum):

> No one doubts that there are more possible classifications of mentality than the sane and the insane. (Citation) Criminologists and psychologists

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[2]As nearly as counsel can recall, the questions were such as this from Judge Lively, "Aren't you really talking about the defense of insanity?", to which counsel responded in the negative.

> have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of a jury's determination of the degree of crime of which a mentally deficient defendant may be guilty.

In *Rhodes* v. *United States*, 282 F,2d 59, 60 (1960), the Fourth Circuit said:

> While it is true that the defense of insanity was not advanced, it was still open to the defendant to introduce psychiatric testimony to show that, by reason of his mental condition, he was unable to form the requisite intent or *mens rea*, which is an essential element of the crime charged.

Of course, if the evidence is relevant, there ought to be some instruction to the jury telling them how to use the evidence. See also *United States* v. *Currens*, 290 F 2d 751, 766-67 (CA 3, 1961), which spoke of the absurdity of the right-wrong test of the M'Naghten rule "to determine the sanity or insanity, the *mental health or lack of it*, of the defendant."

Compare *United States* v. *Pawlak*, 352 F Supp 794, 801-02 (SD NY 1972), which noted that the general rule of the Second Circuit was that psychiatric testimony was not admissible solely on the issue of wilfulness and also noted that this rule was in conflict with the Fourth Circuit and the District of Columbia Circuit.

Since petitioner's trial, Rule 12.2 FRCrP became effective. It recognizes the defense of insanity in subsection a. Subsection b clearly recognizes a distinct defense based upon mental disease or defect without regard to whether the defendant is insane. In our view, Rule 12.2 renders the Second Circuit line of cases obsolete. However, the conflict still exists and should be resolved because the question is so important to the administration of justice.

II.

BOTH PETITIONER AND THIS COURT ARE ENTITLED TO KNOW THE REASONS BEHIND THE DECISION BELOW.

If the Court below had simply said, "No" to petitioner, that response would have been not one whit less illuminating than the order of affirmance, Appendix "B" infra. Petitioner is entitled to something more, if not as a matter of due process, then at least out of respect for the integrity of the judicial function.

A court's decision should be based upon the reasoning of the court rather than its will. And if that reasoning is not communicated at least to the litigants, then how can the workings of justice be made so manifest that any claim of arbitrary action by the court would be "irrational or perverse".[3]

The exponential growth of litigation, particularly at the appellate level, has seriously burdened our judicial resources. No one will deny this, nor will any right thinking person deny the need for streamlining judicial procedures. The increased use of paralegal assistants, pre-hearing conferences to narrow the issues, and reduction of published opinions are all acceptable methods of preventing the courts from being overwhelmed by the increased volume of work.

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[3]Compare *Communist Party* v. *Subversive Activity Control Board*, 351 US 115 at 124 (1956):

> Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so *manifest* that only irrational or perverse claims of its disregard can be asserted. [Emphasis supplied]

Completely unacceptable is any shortcut which dilutes the quality of judicial decisions. It is our premise that if at least the litigants are not told how the court has reached a decision in matters that are not discretionary, the quality of decision making will drop disastrously.

We are not alone in this view. The Commission on Revision of the Federal Court Appellate System, after extensive hearings and written submissions from individuals and organized groups of the Bar, submitted its report to the President and to the Chief Justice of the United States on June 20, 1975. The Commission sent 3,000 questionaires to lawyers of the Second Fifth and Sixth Circuits, more than 60 percent of whom responded. The Commission noted, at page 94 of its report, "It should occasion no surprise that the [responding attorneys] were emphatic in affirming the importance of . . . written opinions." The report continued, at page 108:

> The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed, that the due process clause of the Constitution should be held to require Courts of Appeal to write "at least a brief statement of the reasons for their decisions." Quite consistenely, the respondents rejected the proposition that reducing the number of opinions issued is the most acceptable way to avoid long delays. As was the case with oral argument, attorneys were unwilling to buy speed with what appeared to them to be a sacrifice in the quality of the judicial product or the integrity of the process.

> The specific values which the attorneys found in opinion writing helped explain the significance which they attach to opinions. Some values are a function of the role of the Court of Appeals in the judicial system: the necessity for a reasoned disposition to furnish a guide for District Court judges and the Bar in future cases, and the need to provide the Supreme Court with insight into the Court of Appeals' reasoning when the justices consider petitions for certiorari.
>
> Particularly striking is the fact that more than three-fourths of the attorneys questioned agreed that it is important for the Courts to at least issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be assured that the attention of at least one judge was given to the case. If the lawyers' perceptions are to be credited, the risk of harm to the public confidence in the judicial system from unexplained decisions could become serious.

It was the Commission's recommendation, at page 112 of the report:

> First we recommend that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision. In an appropriate case, citation to a single precedent would suffice. In other cases, informal memoranda, intended for the parties themselves, would serve the purpose intended. Opinions can be signed or unsigned, published or unpublished, but in each case the litigants and their attorneys wouls be apprised of the reasoning which underlies the conclusion of the court.

This Court has not been completely insensitive to the problem. For example, in *Will* v. *United States*, 389 US 90, at 107 (1967), it said:

> We fail to see how [the corrective and didactic function of the Court] can be served here without findings of fact by the issuing Court and some statement of the Court's legal reasoning. A mandamus from the blue without rationale is tantamount to an advocation of the . . . expository and supervisory functions of an appellate court . . .

It is nearly impossible to draft a petition for rehearing of a decision issued without any statement of reasoning by the Court. If the Court's decision is based upon a misreading of the record or a misunderstanding of the law, the possibility of which no judge worth his salt would deny, the litigant has no way of discovering such fact and bringing it to the court's attention.

Furthermore, the failure of the Court to give its reasons for decision is unfair to this Court should the litigant seek further review here. For example, the litigant has a difficult time demonstrating that a circuit conflict exists. He must ask the Court to glean the circuit's position on an issue from a number of prior cases rather than from the opinion in his own case. This is particularly frustrasting when the prior cases, as here, do not precisely cover the issue in litigation.[4]

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[4]The Courts of Appeals require an appendix to include all opinions of the trial judge. The reason for such requirement is obvious. Here, the trial judge took the trouble to write an opinion covering the issues raised in our motion for new trial. If the Court of Appeals requires such an opinion for its consideration, why should it not also be required to give an opinion for this Court's consideration?

The issues on our appeal were not frivolous. Two of them are tendered in this petition. Two others are stated only as reserved questions because, in our judgment, standing alone, they would not justify intrusion on this Court's busy schedule. We mention the substance of them in footnote only.[5]

It may well be that the Constitution does not guarantee a criminal litigant the right of an appeal from his conviction. But if an appeal is allowed, it should be in a manner consistent with the Constitution. *Cf. Griffin* v. *Illinois*, 351 US 12, 18 (1956). We assert, along with the more that 2,000 lawyers surveyed by the Commission on Revision of the Federal Court Appellate System, that at least a brief statement of reasoning is a requirement of

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[5]It was undisputed that petitioner filed his returns and paid his taxes before he was first visited by the Intelligence agents; that he was truthful in every respect in the several interviews with the agents; and that he was aware that his delinquency would cost him substantially in interest and penalties. The trial judge refused to give petitioner's requested theory instruction which incorporated these facts for the jury to consider as raising possible inferences against wilfulness. He affirmatively instructed the jury that the fact that petitioner settled the civil liability in the payment of the taxes "is not to be considered by you in this case."

Where state of mind is in issue, it can be proven only by circumstantial evidence. Considerable latitude must be accorded in the receipt of evidence on such issues. *Hoyer* v. *United States*, 223 F2d 134, (CA 8 1955); *Roe* v. *United States*, 316 F2d 617, 621 (CA 5 1963). If the Defendant had misrepresented facts to the Intelligence agents, or had not filed his return until after the agents called upon him, these facts could be brought out by the government in support of its proof of wilfulness. *United States* v. *Greenlee*, 517 F2d 899, 903 (CA 3 1975) Cf. *United States* v. *Rosenfeld*, 469 F2d 598, 600 (CA 3 1972). The wide latitude allowed when state of mind is in issue should be a two-way street, open for passage both to the prosecution and the defense.

(continued on next page)

due process. This overwhelming weight of legal opinion should not be disregarded lightly. Cf. *In Re Winship*, 397 US 358, 361-62:

> Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered."

(continued from preceding page)

In his motion for new trial, petitioner asked for an opportunity to prove that there existed within the IRS a written policy which gave "special priority" to the prosecution of tax crimes by attorneys and CPAs. Petitioner unsuccessfully sought discovery in order to prove his charge. Some of the details of the IRS policy are referred to in *United States* v. *Swanson*, 509 F2d 1205 (CA 8 1975). If petitioner had been given the opportunity to prove such discriminatory policy and had proven it, the prosecution should have been dismissed. In *Davis* v. *Mann*, 377 US 678, 691 (1964), this Court said:

> Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.

Petitioner also offered to prove substantial numbers of non-prosecution of failures to file by individuals other than attorneys and accountants. According to the publicly announced policy of the U. S. attorney for the Western District of Michigan:

> . . . I have stated publicly that any citizen who comes forward and admits he had not paid taxes, before being found out, will not be prosecuted criminally. He will face civil penalties, but he will not have to think about going to jail.
>
> Michigan State Bar Journal, February, 1974, page 111.

Given the opportunity, we believe we would be able to demonstrate a similar policy in the Eastern District of Michigan, or within the IRS with reference to individuals other than lawyers and accountants.

But if this Court is not ready to incorporate a reasoned opinion as a requirement of due process in appellate litigation, it should require it in those courts over which it has direct supervision. One of the considerations which impels this Court to grant certiorari, see Rule 19 of this Court, is:

> (b) Where a Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.

This Court should not be prepared to say that a lack of reasoning in an appellate decision is the accepted and usual course in federal appellate courts in matters not involving discretion.

III.

WHEN THE JURY INDICATED ITS DIFFICULTY WITH THE CONCEPT OF WILFULLNESS, THE COURT SHOULD HAVE GIVEN THE REQUESTED SUPPLEMENTAL INSTRUCTIONS. AT THE VERY LEAST HE SHOULD HAVE STATED THAT WILFULLNESS WAS A LEGAL RATHER THAN A LAYMAN'S DEFINITION.

The only contested issue at trail was the wilfullness of petitioner. The trial judge correctly defined the concept in his charge. Even though his instructions also told the jury that they should use only the definition which he gave them, it is obvious that the jury was having trouble following this instruction. It coupled its request for a definition of wilful and wilfullness with a request for a dictionary.

Bollenbach v. *United States*, 326 US 607, 612-13 (1946), tells what was required in such a situation:

> When a jury makes explicit its diffuculties, a trial judge should clear them away with concrete accuracy. In any event, therefore the trial judge had no business to be "quite cursory" in the circumstances in which the jury here asked for supplemental instructions.

The ruling below, approving the refusal of the trial judge to give additional instructions, conflicts with the rule in the District of Columbia and Ninth Circuits.

In *Wright* v. *United States*, 250 F2d 4 (CA DC 1957), the defendant's sanity was in issue. The Court gave the jury an appropriate and accurate instruction on the Durham rule.[6] After several hours of deliberation, a juror asked for clarifying instructions. The trial judge replied that he had read the instructions to the jury and that he was not going to amplify on them because they were all-inclusive. What the Court of Appeals said in reversing the conviction is precisely in point to the issue we raise:

> The refusal to answer the juror's question and the denial of the requested instruction constitute reversible error. The sample Durham charge was not meant to be and is not an inflexible directive to be followed by rote. It sketches the substance of what the judge should in some way convey to the jury. Where, as here, the need for more appears, it is the duty of the judge to fill in the sketch, as may be appropriate on the basis of the evidence, to provide the jury with light and guidance in the performance of its difficult task. [Interior quotes and citations omitted.]

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[6]*Durham* v. *United States*, 214 F2d 862 (CA DC 1954).

Two cases illustrate the Ninth Circuit rule:

> As we have noted, the jury's inquiry showed [that] the initial charge left the jury confused. A rereading of a portion of that charge which was not clearly responsive to the jury's inquiry could scarcely have clarified the matter in the juror's minds. Clear error occurred, requiring reversal. *Powell* v. *United States*, 347 F2d 156, 158 (1965).

> As the trial judge accurately noted in earlier instructing the jury, ignorance of the law is to be considered in determining whether there existed the specific intent necessary for a violation of the law charged. While the principle has often been stated by the Courts that ignorance of the law is no excuse, its use in the circumstances of this case was at least misleading to the jury. The jury had previously indicated that it was having difficulty with the terms intent and motive, and the judge's summary treatment of the meaning of ignorance of the law may have caused the jury to eliminate it as a factor affecting specific intent. *United States* v. *Peterson*, 513 F2d 1133, 1135 (1975).

See also *Bland* v. *United States*, 299 F2d 105 (CA 5 1962).

Almost as invidious as the trial judge's refusal to amplify on his original instructions, was the procedure he followed in allowing the jury to hear his original instructions again. He told the jury:

> If you have any difficulty in finding the place on the tape as to where the definition of wilfulness is made, Mr. Paul, the bailiff, will gladly assist you.

The jury, in fact, called for the bailiff's assistance.

What the bailiff decided were the appropriate instructions on wilfulness, of course, is not a matter of record, since it occurred in the jury room. This method of reinstructing the jury is certainly not "the accepted and usual course of judicial proceedings." Rule 19 (1)(b) of this Court. The matter or reinstructions, being the last official word the jury receives from the Court before reaching a verdict, should be a matter of record, and done by the judge in open court rather than by the bailiff in the jury's inner sanctum.

The Sixth Circuit's approval of this practice conflicts with *Little* v. *United States*, 73 F2d 861 (CA 10 1934), which disapproved allowing the court reporter to enter the jury room to reread the instructions of the Court. Compare *United States* v. *Pittman*, 449 F2d 1284 (CA 9 1971), which reversed a conviction because the agent in charge of the prosecution replayed a tape recording to the jury during their deliberations. Admittedly, having the agent-in-charge rather than the bailiff play the recording makes the facts in that case more aggravated than those in ours, but the principle is the same.

RELIEF REQUESTED

For the foregoing reasons, petitioner prays that his petition for certiorari be granted either for plenary review of the questions tendered, or in the alternative, to vacate the judgment and remand the case to the Court of Appeals for decision in reasoned opinion on each of the issues raised there.

Respectfully submitted,

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Dated: Sept. 15, 1976

APPENDIX A

MEMORANDUM OPINION RE MOTION FOR A NEW TRIAL

This opinion denies defendant's motion for a new trial in this cause and supplements the reasons stated in court on August 4, 1975.

Several grounds were urged in support of the motion for a new trial.

Defendant contends that when the court was requested by the jury to furnish them with a dictionary and declined so to do, the court should have again instructed the jury concerning the element of willfulness. The point is raised that the jury apparently was not clear as to the instruction on willfulness and thus wished to make its own investigation into the meaning of the concept.

As to this point the court notes that it had placed its entire charge to the jury on a tape cassette and instructed the jury:

> "If during your deliberations you wish to hear any part of the charge that I have just given to you, you may play it over again, or any part of it. All you need to do is to ask [Mr. Paul] for the recorder and for the tape cassette and it will be up to you to use that charge in any way that you see fit."

Thus the jury charge was available to the jury and in the court's opinion it was not necessary to re-instruct them as to this concept.

Defendant contends that under the circumstances in the case, since the jury was allowed to recess for the weekend, they might have themselves consulted a

dictionary for the definition of this term. The court rejects this contention since there is no indication that that did occur and the court thoroughly instructed the jury that they were not to consider any other definitions than the one given to the jury in the court's instructions.

Further, defendant contends that he had knowledge of a special project in the Internal Revenue Service known as the Ace project, which allegedly give special priorities to offenses committed in the tax field by professionals such as attorneys and accountants. The contentions regarding this project were speculative at best. This practice, if it was involved in this case, was never developed factually and under the circumstances the court is unable to find any prejudice whatever to the defendant. Defendant claims that the practice requires the application of an exclusionary rule, but this the court rejects.

For these reasons, defendant's motion for a new trial is denied and for the purpose of having the record in this case in a correct position, this motion, it is noted, was denied as of August 4, 1975, and not as of this date when this supplemental written opinion issues.

JOHN FEIKENS
United States District Judge

Dated: Detroit, Michigan
November 4, 1975

APPENDIX B

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(Filed July 8, 1976)

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

This is an appeal from a jury conviction for failure to file an income tax return for the year 1970 in violation of 26 U.S.C. § 7203 (1970). Appellant was acquitted on two other counts of failure to file.

Appellant contends that the trial court erred in refusing his proposed instructions to the jury and in not adequately responding to the jury's requests for supplementary instruction during deliberations. He also contends that the trial court was in error in sending the jury back for further deliberation on the third count after they had acquitted him on the first two counts. Finally, he claims that he was a victim of discriminatory prosecution.

After examination of the record and consideration of the briefs and oral argument of counsel, we conclude that Appellant's arguments are without merit.

It is therefore ORDERED that the judgment be, and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

By: /s/ John P. Hehman, Clerk

APPENDIX C

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(Filed August 17, 1976)

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

Appellant having filed a petition for rehearing en banc and an affirmative vote of a majority of the active judges of the court not having been received in favor thereof the petition has been referred to the panel which heard the original appeal,

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By: /s/ Grace Keller, Chief Deputy

APPENDIX D

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court — United States)

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1976.

/s/ Potter Sewart
Associate Justice of the
Supreme Court of the
United States

Dated this 20th day of September, 1976.